89-2003

FILED
JUN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

In the

Supreme Court of the United States.

October Term, 1989

MASSACHUSETTS BOARD OF REGISTRATION
IN MEDICINE,
PETITIONER,

v.

LAWRENCE KVITKA,
RESPONDENT.

Petition for a Writ of Certiorari to the
Massachusetts Supreme Judicial Court.

James M. Shannon,
Attorney General
Commonwealth of Massachusetts,
Judith Fabricant*
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108
(617) 727-2200, ext. 2076
Counsel for Petitioner

*Counsel of Record

Question Presented

Does the double jeopardy clause of the United States Constitution prevent a state medical licensing board from fining a physician for misconduct for which he has been punished criminally, where the effect of the fine is to require the physician to disgorge profits obtained through his misconduct?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
1. Facts	4
2. Prior Proceedings	9
REASONS FOR GRANTING THE WRIT	10
THE PETITION SHOULD BE GRANTED TO CLARIFY THE LIMITS OF UNITED STATES v. HALPER AND TO PROTECT EFFECTIVE LAW ENFORCEMENT.	10
A. The Supreme Judicial Court has Applied Halper too Broadly.	14
1. The Court Below Erroneously Applied a Subjective Analysis.	15

Page

2. The Court Below Misinterpreted Halper as Holding That a Fine Compelling the Disgorgement of Illicit Profits Could not be Considered Remedial. 21

B. The Decision Below Poses a Substantial Threat to Effective Law Enforcement. 23

1. The Decision Would Hamper Civil Law Enforcement Proceedings. 24

2. The Decision Would Hamper Criminal Prosecutions. 26

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 8a

TABLE OF AUTHORITIES

Cases	Page
Helvering v. Mitchell, 303 U.S. 391 (1938)	25
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	18
One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972)	25
S.E.C. v. MacDonald, 699 F.2d 47 (1st Cir. 1983)	22
S.E.C. v. Tome, 833 F.2d 1086 (2d Cir. 1987)	23
Tull v. United States, 481 U.S. 412 (1986)	23
United States v. Halper, 409 U.S. _____, 109 S. Ct. 1892 (1989)	passim
United States v. Marcus Schloss & Co., Inc., 724 F. Supp. 1123 (S.D.N.Y. 1989)	27
United States v. Mayers, 897 F.2d 1126 (11th Cir. 1990)	27
United States v. Pani, 717 F. Supp. 1013 (S.D. N.Y. 1989)	13

Cases	Page
United States v. A Parcel of Land, 884 F.2d 41 (1st Cir. 1989)	12, 20, 25
United States v. Sanchez, 47 Crim. L.R. 1026 (S.D. Tex., 3/14/90)	27
United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222 (S.D. Fla. 1989)	13
United States v. WRW Corporation, et al., 731 F. Supp. 237 (E.D. Ky. 1989)	12, 20
Statutes	
Mass. G.L. c. 21, §§ 26-53 (1988 ed.)	24
Mass. G.L. c. 21C, § 1 et seq. (1988 ed.)	24
Mass. G.L. c. 94C, § 19(a) (1988 ed.)	6, 7
Mass. G.L. c. 94C, § 31B(d)(1) (1988 ed.)	
Mass. G.L. c. 111, § 142A-J	25

Statutes	Page
Mass. G.L. c. 112, § 5 (1988 ed.)	3
Mass. G.L. c. 112, § 64 (1988 ed.)	4, 9

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MASSACHUSETTS BOARD OF REGISTRATION
IN MEDICINE,
Petitioner,

v.

LAWRENCE KVITKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

The Massachusetts Board of Registration in Medicine respectfully petitions for a writ of certiorari to

review the judgment of the Massachusetts Supreme Judicial Court in this case.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 407 Mass. 140, 551 N.E. 2d 915 (Mass. 1990), and is reproduced as Appendix A hereto. The decision of the Massachusetts Board of Registration in Medicine, which the Supreme Judicial Court reversed, is reproduced as Appendix B hereto.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on March 27, 1990 (App. 1a). The Supreme Judicial Court held that a decision of the Massachusetts Board of Registration

in Medicine violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1257 (1988 ed.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Mass. G.L. c. 112, § 5 (1988 ed.) provides in pertinent part:

> The board [of registration in medicine] may, after a hearing . . . revoke, suspend, or cancel the certificate of registration, or reprimand, censure, impose a fine not to exceed ten thousand dollars for each classification of

> violation, require the performance of up to one hundred hours of public service, in a manner and at a time and place to be determined by the board, require a course of education or training or otherwise discipline a physician . . .

Mass. G.L. c. 112, § 64 (1988 ed.) provides in pertinent part:

> The supreme judicial court, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, may enter a decree revising or reversing the decision of the board in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A . . . .

STATEMENT OF THE CASE

1. Facts

During a five year period ending in 1986, Dr. Lawrence Kvitka, together with two other individuals, engaged in a

scheme to distribute percocet[1/] unlawfully and for profit, through the issuance of fraudulent prescriptions (App. 2a). Pursuant to this scheme, in 1985 and 1986, Dr. Kvitka wrote approximately 245 prescriptions in the names of various patients, former patients, and other persons who never received them (App. 2a). Dr. Kvitka sold the prescriptions to the other two individuals for thirty dollars apiece; they then filled the prescriptions at various pharmacies (App. 14-15).

This scheme came to light as a result of routine inspections of pharmacy files by officers of the

---

1/ Percocet is a trade name for oxycodinone, a narcotic depressant classified at Mass. G.L. c. 94C, § 31B(d)(1) (1988 ed.) as a class B controlled substance.

Massachusetts State Police (App. 14a). After repeatedly noting Dr. Kvitka's name on prescriptions for either thirty or fifty tablets of percocet, filled at a large number of pharmacies, the police began contacting the patients named in the prescriptions (App. 14a-16a). The persons contacted denied knowledge of the prescriptions (App. 16a-26a).

On April 30, 1987, state police officers arrested Dr. Kvitka on charges of unlawfully dispensing controlled substances in violation of Mass. G.L. c. 94C, § 19(a) (1988 ed.) (App. 2a, 28a). At the time of his arrest, Dr. Kvitka admitted his participation in the scheme, and explained his motivation as to obtain "some pin money . . . some money that he didn't have to report." (App. 2a, 28a-30a). He estimated that he had "made approximately eight to ten

thousand dollars in this manner." (App. 2a, 29a). On May 25, 1988, Dr. Kvitka pled guilty to ten counts of violating Mass. G.L. c. 94C, § 19(a) (1988 ed.) (App. 2a). He received a sentence of three to five years in the state prison, suspended, and fines totalling $60,000, to be paid in monthly installments (App. 2a).

On September 16, 1987, the Board of Registration in Medicine ("the Board") issued a complaint charging Dr. Kvitka with five separate violations of statutes and regulations governing the practice of medicine (App. 8a-9a). After an evidentiary hearing before a hearing officer, the Board entered detailed findings of fact and conclusions of law (App. 8a-37a). In

its Decision and Order of September 7, 1988, the Board found Dr. Kvitka guilty of: (1) conduct which places into question his competence to practice medicine; (2) practicing medicine deceitfully and engaging in conduct which has the capacity to deceive or defraud; (3) an offense against a provision of the laws of the Commonwealth relating to the practice of medicine; and (4) conduct which undermines public confidence in the integrity of the medical profession and which shows lack of good moral character (App. 31a-33a). Observing that Dr. Kvitka's conduct "constituted a flagrant abuse of the public trust relating to controlled substances," the Board revoked his license to practice medicine and further ordered him to pay

a fine of ten thousand dollars within fourteen days of its order (App. 34a-36a). The Board characterized the ten thousand dollar figure as "the estimated sum that [Dr. Kvitka] gained by his fraudulent scheme" (App. 36a).

2. Prior Proceedings

On October 12, 1988, Dr. Kvitka filed a petition for judicial review of the Board's order in the Massachusetts Supreme Judicial Court, pursuant to Mass. G.L. c. 112, § 64 (1988 ed.) (App. 1a). Dr. Kvitka's petition challenged only the fine, alleging that it exceeded the Board's statutory authority, and that it violated his constitutional protection against double jeopardy (App. 2a).

On March 27, 1990, the Supreme Judicial Court issued its decision

reversing the Board's order (App. 1a). The Supreme Judicial Court relied on this Court's decision in United States v. Halper, 409 U.S. _____, 109 S. Ct. 1892 (1989). As petitioner demonstrates, infra, the Supreme Judicial Court extended the scope of that decision far beyond its terms, in a manner that poses a substantial threat to effective law enforcement in both civil and criminal proceedings.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED TO CLARIFY THE LIMITS OF UNITED STATES v. HALPER AND TO PROTECT EFFECTIVE LAW ENFORCEMENT.

In United States v. Halper, 409 U.S. ____, 109 S. Ct. 1892 (1989), this Court held that "under the Double Jeopardy clause a defendant who already has been punished in a criminal

prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 409 U.S. at ___, 109 S. Ct. at 1902. That holding arose from an extreme factual context, involving a civil monetary sanction in an amount "exponentially greater than the amount of the fraud." 409 U.S. at ___, 109 S. Ct. at 1900.[2/] Describing its decision as "a rule for

---

2/ The defendant in Halper had submitted 65 false claims, each of which overstated the amount due by nine dollars; he thereby obtained a total of $585 in unearned reimbursement. After a criminal prosecution resulting in a sentence of imprisonment for two years and a $5,000 fine, the government brought suit under the Civil False Claims Act, which provides for a sanction of $2,000 per false claim, plus costs, for a total of more than $130,000. 109 S. Ct. at 1896.

the rare case," the Court took pains to limit its application to a narrow category of cases involving similarly disproportionate monetary penalties. 409 U.S. at ___, 109 S. Ct. at 1902.

In the year since Halper, several federal courts have read that case as not precluding civil fines or forfeitures, despite previous criminal punishment, in the absence of the gross disproportion presented there. E.g. United States v. A Parcel of Land, 884 F.2d 41 (1st Cir. 1989) (Halper rule does not bar forfeiture of entire parcel of land after criminal prosecution for growing marijuana on part of parcel); United States v. WRW Corporation, et al., 731 F. Supp. 237 (E.D. Ky. 1989) ($90,350.00 civil penalty for violation of coal mine safety standards survives

Halper, despite criminal punishment for same acts); United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222 (S.D. Fla. 1989) (forfeiture of $55,000 boat for fish and game violations not precluded by previous criminal punishment); United States v. Pani, 717 F. Supp. 1013 (S.D. N.Y. 1989) ($32,460 civil penalty for $1,280 in false claims, already punished in criminal court, not so disproportionate as to be second punishment under Halper).

In the decision below, however, the Supreme Judicial Court has misread Halper. The Supreme Judicial Court's decision contrasts sharply with these federal court interpretations of Halper, and demonstrates that, despite this Court's explicitly narrow holding, the Halper decision is susceptible of

serious misinterpretation. The Court should therefore grant the Writ in order to clarify the limits of Halper and to forestall further unwarranted extensions of that decision.

A. The Supreme Judicial Court has Applied Halper too Broadly.

The Supreme Judicial Court has misinterpreted Halper in two significant respects. First, the Court looked to the Board's stated reasons for imposing the fine, thus relying on a subjective test of motivation, rather than an objective test of effect. Second, the Court read Halper as limiting the permissable remedial purposes of a monetary sanction to reimbursement of the government or an identifiable victim for a direct monetary loss, thus ignoring longstanding federal authority

that recognizes disgorgement of illicit profit as remedial. See infra pp. 22 - 23.

1. The Court Below Erroneously Applied a Subjective Analysis.

The Supreme Judicial Court began its evaluation of the purpose of the Board's fine against Dr. Kvitka by observing that "the Board, in articulating its rationale for imposing the sanctions, did not indicate that its purpose was remedial." 407 Mass. at 145 (App. 6a). The court went on to note that "the Board, in its decision, did not base the fine on its administrative expenses." Id. at 146 (App. 7a). Rather, the Court observed, "the board characterized the physician's actions as 'a flagrant abuse of the public trust,' and stated that 'misconduct in the area of prescription practice' will not be treated lightly."

Id. at 145 (App. 6a). From these observations that Court inferred "both a desire on the part of the board to penalize the physician and a warning to other physicians to refrain from engaging in similar conduct." Id. The Court thus concluded that the purposes of the fine were punitive, not remedial, so that the fine was a constitutionally prohibited second punishment.

This approach is directly contrary to this Court's decision in Halper. The Court there described the proper inquiry not as an evaluation of the subjective intentions of the decision-maker, but as "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said the serve." 409 U.S. at ___, 109 S. Ct. at 1901. The sanction is punishment, in

the Court's words, "when the sanction as applied in the individual case serves the goals of punishment." Id., 409 U.S. at ___, 109 S. Ct. at 1902. Thus, the reviewing court should consider not what motivated the decision-maker to impose a particular sanction, but what effect the sanction actually has.

This distinction of analytic approach is no mere academic point. On the contrary, it was this distinction, and the practical consequences that flow from it, that led Justice Kennedy to write a separate concurring opinion stressing that the Court's holding "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case." Id., 409 U.S. at ___, 109 S. Ct. at 1904. The decision, Justice Kennedy

emphasized, "does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding." See also Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Such an inquiry, Justice Kennedy observed, "would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding . . . [it] would also breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands."

Furthermore, a subjective analysis of the sort the Supreme Judicial Court engaged in would make constitutional adjudication turn on the fortuity of the

decision-maker's choice of phrasing in explaining the sanction; a sanction described by reference to the seriousness of the offense would be viewed as retributive, and therefore as punishment for double jeopardy purposes, while the same sanction, for the same offense, in another case would not qualify as punishment, merely because the decision-maker refers to its remedial effects, remaining silent as to the desirability of deterrence and retribution. This arbitrary result would subvert effective law enforcement and undermine respect for the law.

Had the Supreme Judicial Court applied the proper analysis under Halper, it would have noted that the $10,000 fine imposed by the Board closely approximated the eight to ten

thousand dollars that Dr. Kvitka himself estimated he had gained through his fraudulent scheme (App. 2a). It would thus have concluded that the fine served to prevent Dr. Kvitka from retaining his illicit profit, and thus to promote the actual and perceived integrity of the medical profession.[3/]

This effect, as the Supreme Judicial Court additionally failed to recognize, is remedial and not punitive for purposes of double jeopardy analysis. See part 2 infra.

3/ In addition, the fine could be expected to provide the Commonwealth a rough approximation of the likely cost of investigating and prosecuting Dr. Kvitka's misconduct. See United States v. A Parcel of Land, 884 F.2d at 44; United States v. WRW Corp., 731 F. Supp. at 239.

2. The Court Below Misinterpreted Halper as Holding That a Fine Compelling the Disgorgement of Illicit Profits Could not be Considered Remedial.

Relying solely on Halper, the Supreme Judicial Court held that "forced disgorgement of illicit profits . . . cannot be considered remedial under the double jeopardy clause." 407 Mass. at 140.[4/] The Court distinguished Halper on the ground that "[t]his is not a case where the government itself has suffered a loss because of the physician's fraud . . . or where there is an identifiable victim who has suffered damages due to the physician's actions." Id. Thus, the Supreme Judicial Court apparently

---

4/ This reference to the double jeopardy clause would refute any suggestion that the court relied on any state law ground for its rejection of disgorgement as a remedial purpose.

understood Halper as holding that the only remedial purpose of a monetary sanction would be to reimburse the government, or an identifiable victim, for direct monetary loss.

Halper does not so hold. Since the offense involved there was a financial one directed against the government, it is hardly surprising that this Court's opinion made reference to reimbursement for monetary damage and for costs as the permissible remedial purposes of a money sanction in that case. But nothing in Halper suggests that such reimbursement is the only purpose that would qualify as remedial under the double jeopardy clause. Moreover, long-standing federal precedent indicates that disgorgement is remedial, not punitive. S.E.C. v. MacDonald, 699 F.2d 47, 54 (1st Cir.

1983)("[d]isgorgement is remedial and not punitive"); see Tull v. United States, 481 U.S. 412, 423-4 (1986)(disgorgement of illicit profits distinguished from punishment); S.E.C. v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987)(primary purpose of disgorgement is "to make sure that wrongdoers will not profit from their wrongdoing"). This Court's decision in Halper contains no hint of any intention to overrule these cases.

B. The Decision Below Poses a Substantial Threat to Effective Law Enforcement.

The Supreme Judicial Court's expansive reading of the Halper decision calls into question the validity of sanctions regularly imposed in a wide variety of civil law enforcement

proceedings, both state and federal, involving conduct that may also be the subject of criminal prosecution. In addition, and perhaps even more alarming, the decision below threatens to impede criminal prosecutions in a significant category of cases where criminal sanctions would be appropriate.

1. The Decision Would Hamper Civil Law Enforcement Proceedings.

In addition to professional discipline cases such as the one in issue here, and cases under the federal False Claims Act, such as Halper, state and federal authorities rely on civil proceedings to enforce statutes promoting a wide range of public goals. These goals include environmental protection, e.g. Mass. G.L. c. 21, §§ 26-53 (Clean Waters Act), c. 21C, § 1

et seq. (Hazardous Waste Management Act), c. 111, § 142A-J (Clean Air Act); collection of taxes, e.g. Helvering v. Mitchell, 303 U.S. 391 (1938); prevention of the dissemination of illicit drugs, e.g. United States v. A Parcel of Land, 884 F.2d 41 (1st Cir. 1989); and enforcement of customs regulations, e.g. One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972).

Under the Supreme Judicial Court's broad reading, Halper would require an inquiry into the subjective motivations of the decision-maker whenever such a case follows criminal punishment. Any hint of a hope to deter, to express condemnation of the misconduct, or to restore the wrongdoer to his previous position, might invalidate the

sanction. Indeed, under the Supreme Judicial Court's ruling, a civil monetary sanction that follows criminal punishment could survive only if it provides direct reimbursement for monetary loss suffered by the government, and even then only if the decision-maker acknowledges no motive other than to effect such reimbursement.

2. The Decision Would Hamper Criminal Prosecutions.

Moreover, under the Supreme Judicial Court's interpretation, the Halper rule might substantially impair the government's ability to enforce the laws through criminal prosecutions, as well as civil proceedings. From Halper's holding that a civil sanction may constitute punishment for double jeopardy purposes, it may be argued that

a punitive civil sanction would bar a later criminal prosecution. At least three federal courts have so held. United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990); United States v. Sanchez, 47 Crim. L.R. 1026 (S.D. Tex., 3/14/90); United States v. Marcus Schloss & Co., Inc., 724 F. Supp. 1123, 1126 (S.D.N.Y. 1989). Under the Supreme Judicial Court's expansive reading of Halper, this bar to criminal prosecution might be held to apply in a significantly larger category of cases than it would if Halper were limited to "the rare case" described in this Court's decision.

For example, under the Supreme Judicial Court's ruling, had the Board's action against Dr. Kvitka preceeded the criminal prosecution, the $10,000 fine

might have been held to bar the criminal court from imposing any punishment on Dr. Kvitka for his illegal dispensing of drugs. That effect might even extend to cases where the appropriate criminal punishment would not be limited to a fine, but would include imprisonment.[5/]

Under the Supreme Judicial Court's reasoning, the double jeopardy bar might apply even when the characterization of the prior civil sanction as punitive arises solely from an agency's careless reference to deterrence, along with some remedial purpose. This result, together with the lower court's narrow conception of remedial purposes under the double

---

5/ This Court's decision in Halper does not suggest that any aspect of double jeopardy analysis would turn on the type of punishment imposed in the criminal proceeding.

jeopardy clause, could have devastating consequences for the effectiveness of law enforcement. Criminal authorities may be barred from prosecuting serious crimes because of relatively minor sanctions imposed by agencies over which they have no control.

Moreover, the prospect that their decisions might have that effect would tend to discourage civil law-enforcement agencies from imposing sanctions that would otherwise be appropriate. The possibility of such an effect might also provide an incentive for the wrongdoer actively to seek civil sanctions, possibly through a negotiated disposition, so as to immunize himself from criminal prosecution, and the more severe sanctions it might bring. Because of these possible far-reaching

consequences, this Court should review and reverse the Supreme Judicial Court's decision.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

Judith Fabricant*
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2076

*Counsel of Record

Dated: June 26, 1990

TABLE OF CONTENTS

Page

Appendix A

Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, dated March 27, 1990 1a

Appendix B

Opinion of the Massachusetts Board of Registration in Medicine, dated September 7, 1988 8a

LAWRENCE KVITKA *vs.* BOARD OF REGISTRATION IN MEDICINE.

Suffolk. November 8, 1989 - March 27, 1990.

Present: LIACOS, C.J., WILKINS, ABRAMS, O'CONNOR, & GREANEY, JJ.

Board of Registration in Medicine. Administrative Law, Agency, Judicial review, Agency's interpretation of statute. *Constitutional Law*, Double jeopardy.

Although the Board of Registration in Medicine, after a hearing, acted within its authority under G. L. c. 112, § 5, in ordering both the revocation of a physician's license to practice medicine and the imposition of a fine [142-144], the board's levying the fine, after judgment had been imposed on the physician in a criminal proceeding, constituted a second punishment in violation of the constitutional protection against double jeopardy, where a fair reading of the board's decision did not indicate that its purpose in imposing the fine was remedial but, instead, was to punish the physician and to deter future wrongdoing [144-146].

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on October 12, 1988.

The case was reported by *Abrams*, J.

Dale C. Schneider for the plaintiff.

Judith Fabricant, Assistant Attorney General, for the defendant.

LIACOS, C.J. In May, 1988, Dr. Lawrence Kvitka pleaded guilty in Superior Court to ten counts of unlawfully dispensing controlled substances in violation of G. L. c. 94C, § 19 (*a*) (1988 ed.). He received a three to five year suspended prison sentence and fines totalling $60,000. In September, 1988, the Board of Registration in Medicine (board), after a hearing, revoked Kvitka's license to practice medicine and ordered him to pay a fine of $10,000. The physician, pursuant to G. L. c. 112, § 64 (1988 ed.), appealed the decision of the board to a single justice of this court, who reserved and

reported the case to the full court. Kvitka challenges only the propriety of the $10,000 fine. We reverse the decision of the board.

Kvitka was a physician, licensed to practice medicine in the Commonwealth. For a period of five years, until April, 1987, Kvitka wrote prescriptions for the drug Percocet and gave these prescriptions to two individuals. On their face, the prescriptions purported to be issued to patients of Kvitka. The two individuals paid the physician $30 for each prescription. The patients, whose names were used, had no knowledge of the physician's machinations. The physician wrote at least 245 prescriptions in this manner. Kvitka admitted that he made between $8,000 and $10,000 through this scheme. He stated that he engaged in this operation for some extra cash that he would not have to "report."

On April 30, 1987, Kvitka was arrested at his office. On May 25, 1988, he pleaded guilty to ten counts of violations of G. L. c. 94C, § 19 (*a*). A Superior Court judge sentenced the defendant to a term of no less than three and no more than five years at the Massachusetts Correctional Institution at Cedar Junction; the execution of the sentence was suspended for a period of three years. The judge also imposed a fine of $4,500 on each of the ten counts to which the defendant pleaded guilty, and a $1,500 surfine on each of the ten counts, for a total of $60,000.

Kvitka voluntarily surrendered his Drug Enforcement Agency certificate of registration on April 30, 1987, thereby relinquishing his privilege to prescribe controlled substances. In its final decision and order, the board concluded that the respondent was (1) guilty of conduct which places in question his competence to practice medicine, including gross misconduct in the practice of medicine, and practicing medicine fraudulently and beyond its authorized scope, in violation of G. L. c. 112, §§ 5 (*c*) and 61 (1988 ed.), and 243 Code Mass. Regs. § 1.03(5)(a)(3) (1987); (2) guilty of practicing medicine deceitfully and engaging in conduct which has the capacity to deceive or defraud, in violation of 243 Code Mass. Regs. § 1.03(5)(a)(10) (1987); (3) guilty of an

offense against a provision of the laws of the Commonwealth relating to the practice of medicine, and a rule or regulation adopted thereunder, pursuant to G. L. c. 112, §§ 5 (*c*) and 61, and 243 Code Mass. Regs. § 1.03(5)(a)(3) and § 1.03 (5)(a)(10); and (4) guilty of conduct which undermines public confidence in the integrity of the medical profession and which shows a lack of good moral character.[1]

The board revoked Kvitka's license to practice medicine in the Commonwealth. The board ordered Kvitka to pay a fine of $10,000, "the estimated sum that [the physician] gained by his fraudulent scheme."

In discussing its imposition of the sanctions, the board stated: "As a licensed physician in the Commonwealth, the [physician] is entrusted with the grave responsibility of issuing prescriptions for controlled substances. . . . The board has long viewed with the utmost seriousness any physician's inability or failure to faithfully discharge this responsibility. . . . The [physician's] conduct in this case constituted a flagrant abuse of the public trust relating to controlled substances, and such action requires the board to take appropriate action to protect the public. . . . The board has indicated in previous decisions that misconduct in the area of prescription practice will not be treated lightly." (Citations omitted.)

1. *The board's statutory authority to impose sanctions.* Kvitka argues that the board did not have statutory authority both to revoke his license and to impose a fine. He argues that the language of G. L. c. 112, § 5, which empowers the board to discipline physicians, does not allow for the dual sanctions which the board meted out to the physician. We disagree.

General Laws c. 112, § 5 (1988 ed.), provides in relevant part:

> "The board may, after a hearing pursuant to chapter thirty A, revoke, suspend, or cancel the certificate of re-

[1]The board also concluded that Kvitka was not guilty of fraudulently procuring his certificate of registration or its renewal, in violation of G. L. c. 112, § 5 (*a*), and 243 Code Mass. Regs. § 1.03(5)(a)(1).

> gistration, or reprimand, censure, impose a fine not to exceed ten thousand dollars for each classification of violation, require the performance of up to one hundred hours of public service, in a manner and at a time and place to be determined by the board, require a course of education or training or otherwise discipline a physician . . . ."

"The role of the board in the over-all statutory scheme is to take primary responsibility in the regulation of the practice of medicine in the Commonwealth 'in order to promote the public health, welfare, and safety.'" *Levy* v. *Board of Registration & Discipline in Medicine*, 378 Mass. 519, 524 (1979), quoting St. 1975, c. 362, § 3. To further this purpose, we have said that G. L. c. 112, § 5, is to be broadly construed. *Levy*, *supra* at 525. Kvitka argues that the statute's use of the word "or" between the words "registration" and "reprimand" gives the board the choice to impose either those sanctions which appear before the word "or," or those sanctions which appear after that word, but not both. We think Kvitka's interpretation too narrowly construes the statute. In our view, the statute gives the board broad latitude in shaping appropriate sanctions in each case. *Levy*, *supra* at 525. Were we to adopt the physician's reasoning, the board would be powerless, for example, to suspend temporarily a physician's license while ordering the physician to undergo a course in education as a condition for lifting the suspension. We do not think § 5 can be reasonably read to so limit the board's authority. By including the phrase "or otherwise discipline a physician," the statute allows the board to devise sanctions not specifically enumerated in the statute. We do not consider this provision to have restrained the board from imposing appropriate sanctions while suspending or revoking a physician's license. Of course, any sanction actually imposed would be subject to judicial review for abuse of discretion. G. L. c. 112, § 64. G. L. c. 30A, § 14 (1988 ed.).

We note, in addition, that the board frequently has interpreted the statute to allow both license revocation and a fine.

"The duty of statutory interpretation is for the courts . . . but an administrative agency's interpretation of a statute within its charge is accorded weight and deference" (citation omitted). *Massachusetts Medical Soc'y* v. *Commissioner of Ins.*, 402 Mass. 44, 62 (1988).

We conclude that the board acted within its statutory authority in ordering the physician to pay the $10,000 fine. However, this conclusion does not end our inquiry. We must consider whether Kvitka's constitutional claims have merit in light of the fine of $60,000 imposed on him in the preceding criminal case.

2. *Double jeopardy*. Kvitka argues that the board's imposition of the $10,000 fine, after judgment had been imposed by a criminal court, constituted a second punishment in violation of the constitutional protection against double jeopardy.[8]

Kvitka relies principally on a recent case decided by the United States Supreme Court, *United States* v. *Halper*, 109 S. Ct. 1892 (1989). In *Halper*, the Supreme Court was faced with the question whether, and in what circumstances, a civil penalty constitutes punishment under the double jeopardy clause. The defendant in that case, Irwin Halper, had submitted sixty-five false claims for reimbursement to Blue Cross and Blue Shield of Greater New York. Blue Cross overpaid Halper's company $585, and passed these overcharges on to the Federal government. *Id.* at 1896. Halper was convicted on sixty-five counts of violating the criminal false claims statute, and on sixteen counts of mail fraud. He was sentenced to two years' imprisonment and fined $5,000.

The Federal government brought an action against Halper under the civil False Claims Act, 31 U.S.C. §§ 3729-3731 (1982 & Supp. III 1985). The Federal District Court granted summary judgment for the government on the issue of liability. The court determined that the statutory penalty

[8]The double jeopardy clause of the Fifth Amendment to the United States Constitution reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

was $130,000, but concluded that this penalty was barred by the double jeopardy clause.

The Supreme Court, on appeal, stated that "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . . '[R]etribution and deterrence are not legitimate nonpunitive governmental objectives.'. . . [I]t follows that a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." (Citations omitted; emphasis supplied.) *United States* v. *Halper*, *supra* at 1901-1902.[8]

The $10,000 fine cannot survive under *Halper*. The board, in articulating its rationale for imposing the sanctions, did not indicate that its purpose was remedial. A fair reading of the board's decision reveals that its purpose in imposing the fine was to punish the physician and to deter future wrongdoing. The board characterized the physician's actions as "a flagrant abuse of the public trust" and stated that "misconduct in the area of prescription practice will not be treated lightly." These statements indicate both a desire on the part of the board to penalize the physician and a warning to other physicians to refrain from engaging in similar conduct. In

[8]The Supreme Court remanded the case to the District Court to give the government "an opportunity to present to the District Court an accounting of its actual costs arising from Halper's fraud, to seek an adjustment of the District Court's approximation, and to recover its demonstrated costs." *United States* v. *Halper*, *supra* at 1903-1904.

the light of the earlier criminal convictions, these goals are disallowed by the double jeopardy clause.[4]

Even if, as the board suggests, the fine amounted to a forced disgorgement of illicit profits, that purpose cannot be considered remedial under the double jeopardy clause. This is not a case where the government itself has suffered a loss because of the physician's fraud, cf. *United States* v. *Halper*, *supra*, or where there is an identifiable victim who has suffered damages due to the physician's actions. The only remedial aspect of the fine in this case would have been to reimburse the board for the expenses in handling the administrative matter against the physician. But the board, in its decision, did not base the fine on its administrative expenses.[5]

We therefore remand this action to the single justice with directions to enter a judgment reversing the decision of the board with respect to the $10,000 fine.

So ordered.

[4]We note that revocation of the physician's license is considered to be remedial under the double jeopardy clause. See *Helvering* v. *Mitchell*, 303 U.S. 391, 399-400 n.2 (1938) (disbarment of attorneys is remedial), citing *Ex parte Wall*, 107 U.S. 265 (1882).

[5]We do not decide whether G. L. c. 112, § 5, grants the board authority to recover its costs through the imposition of a fine.

COMMONWEALTH OF MASSACHUSETTS

BOARD OF REGISTRATION IN MEDICINE

Suffolk, ss. Adjudicatory Case No. 88-14-SU

In the Matter of	)	Final
	)	Decision &
LAWRENCE KVITKA, M.D.	)	Order

Appearances by: Janice H. Biederman, Esq., for the Board of Registration in Medicine
Robert A. Griffith, Esq., for the Respondent

Summary of Proceedings

This case was commenced by Statement of Allegations, dated September 16, 1987, in which the Board of Registration in Medicine (the "Board") alleged that Lawrence Kvitka (the "Respondent"), violated M.G.L. c. 112, § 5(a) and 243 CMR 1.03(5)(a)(1) (guilty of

fraudulently procuring his certificate of registration or its renewal); M.G.L. c. 112, § 5(b) and 243 CMR 1.03 (5)(a)(2) (guilty of an offense against any provision of the laws of the Commonwealth relating to the practice of medicine, or any rule or regulation adopted thereunder); M.G.L. c. 112, §§ 5(c) and 61 and 243 CMR 1.03(5)(a)(3) (guilty of conduct which places into question his competence to practice medicine, including but not limited to gross misconduct in the practice of medicine, practicing medicine fraudulently, or beyond its authorized scope, or with gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions); and 243 CMR 1.03(5)(a)(10) (guilty of practicing medicine

deceitfully, or engaging in conduct which has the capacity to deceive or defraud). In addition, the Board charged that the Respondent was guilty of conduct which undermines public confidence in the integrity of the medical profession or for conduct which shows lack of good moral character. Raymond v. Board of Registration in Medicine, 387 Mass. 708 (1982), and Levy v. Board of Registration in Medicine, 378 Mass. 519 (1979).

Specifically, the Board alleged that the Respondent had unlawfully written approximately two hundred forty five prescriptions for Percocet in the names of his patients, which were then filled by two individuals, who were not patients, and who filled them in area pharmacies. In exchange for the

prescriptions, the Respondent received $30.00 for each prescription he wrote. The Statement also alleged that the Respondent had been criminally arraigned for the above illegal conduct.

On September 16, 1987, this matter was referred to the current Hearing Officer and a hearing date was scheduled for February 11, 1988, which was continued until March 1, 1988, at which time the adjudicatory hearing took place. At the hearing, the Respondent exercised his rights under Article Twelve of the Massachusetts Constitution and his Fifth Amendment rights under the U.S. Constitution and remained silent. The Respondent was reminded by the Hearing Officer that the Board was entitled to draw an adverse inference from his silence. Both parties

submitted memoranda on sanction.

Description of Evidence

The following evidence has been considered in this decision:

The Associate Prosecutor offered the testimony of:

a) The Respondent, who exercised his Fifth Amendment rights to remain silent; and,

b) Francis O'Brien, a Massachusetts State Police Officer, regarding his investigation of the Respondent's practice, interviews with patients, and former patients.

The Associate Prosecutor also offered the following documentary evidence:

Exhibit 1: The Respondent's 1987-1989 license renewal application, signed by him and dated September 11, 1987.

Exhibit 2: Twenty State Police Investigatory Reports from Troopers Francis O'Brien and Robert Scott, and Corporal William Brown, of the Diversion Investigative Unit ("DIU") of the Massachusetts State Police, to Detective Captain Alfred Duemling, regarding the Respondent, dated May 29, 1987, with copies of prescriptions attached to the reports;

Exhibit 3: Copy of the Respondent's "Voluntary Surrender of Controlled Substances Privileges," from the U.S. Drug Enforcement Agency ("DEA"), dated April 30, 1987; and,

Exhibit 4: Copy of nineteen letters of support for the Respondent, submitted by stipulation of the parties and introduced into the record on March 22, 1988.

The Respondent presented no evidence at the time of the hearing.

Findings of Fact

On the basis of the pleadings and the evidence in the Record, we make the following findings:

1. The Respondent is licensed to practice medicine in the Commonwealth under Certificate No. 19765, which is current. (Ex. 1)

2. Trooper Francis M. O'Brien, of the Diversion Investigative Unit of the State Police, stated that in 1986 he became aware of the Respondent's name in conjunction with his routine inspections of Schedules 2, 3, 4, and 5 controlled substances files in a number of pharmacies spread throughout the Boston and South Shore area. During these inspections, he noticed that all of the

Respondent's prescriptions were for Percocet, and that between 1985 and 1986, the number of tablets in each prescription increased from thirty to fifty. He, and other members of the Diversion Investigative Unit of the State Police ("DIU") and the Federal Drug Enforcement Agency ("DEA"), began analyzing the prescriptions. The subject pharmacies all had prescriptions written by the Respondent for several patients, which were spaced three or four months apart. All prescriptions were written for thirty or fifty tablets of Percocet. Ultimately, as a result of this investigation, the DIU and DEA uncovered two hundred and forty five (245) prescriptions, in approximately 60 area pharmacies, representing approximately eighty (80) patients. (Ex. 2, Tr. I, 16-18)

3. During his investigation, a number of persons listed on the prescriptions were contacted. Trooper O'Brien summarized his meeting with P.O. and D.O., husband and wife, of Milton, regarding four prescriptions for Percocet (50 tablets), written for P.O., as follows:

> [D.O.] advised me that she did know the doctor; in fact they had been associated back in the early eighties at Latin Academy where she was a school nurse and the doctor had some association. But she hadn't seen him in many years. She stated that she may have seen him as a patient once, though, she couldn't recall clearly. [P.O.], her husband, said he's never been a patient of the doctor's, doesn't recall ever meeting him, may have spoken to him on the telephone once, and stated the first time he ever saw Doctor Kvitka was on television when he was arrested. I showed [P.O.] the four prescriptions in my possession, he looked at each of them, he said he never received them had no knowledge of them. (Ex. 2, Tr. I, 20-22)

4. Other persons who were listed on the prescriptions were contacted in 1987

by either Trooper O'Brien, or Trooper Robert Scott, and the patients' accounts, similar to that of persons P.O. and D.O., are summarized below:

a) J.D., of Brookline, was contacted regarding six prescriptions for Percocet, which had been filled at the Rix Pharmacy in Brookline, and stated he did not receive or fill these prescriptions, nor did he have any knowledge of them. He found the situation "ridiculous," and embarrassing because, as an attorney, he had referred clients to the Respondent over the years. (Ex. 2, Tr. I, 21-23)

b) M.H., of Dedham, was contacted regarding six prescriptions for Percocet, which had been filled at the CVS Pharmacy in Needham, and stated she did not receive or fill these

prescriptions, nor did he have any knowledge of them. She was a former patient of the Respondent's. (Ex. 2, Tr. I, 23-24)

c) H.R., of Milton, was contacted regarding 4 prescriptions for Percocet, which had been filled at the Walgreen's in Hyde Park, and stated she did not receive or fill these prescriptions, nor did she have any knowledge of them. She had been a patient of his, but had not seen him in over a year. (Ex. 2, Tr. I, 25-26)

d) C.D., of Sharon, was contacted regarding eight prescriptions for Percocet, which had been filled at Walgreen's in Stoughton. He stated that he did not receive or fill these prescriptions, nor did he have any knowledge of them. He had seen the

Respondent in 1985 for a diabetes test, but had not seen him since 1985. (Ex. 2, Tr. I, 26)

e) M.A., of Marshfield, was contacted regarding four prescriptions for Percocet, which had been filled at the Brooks Drugstore, in Rockland, and stated he did not receive or fill these prescriptions, nor did he have any knowledge of them. He had been a patient of the Respondent's in 1986, and received blood pressure medication from him, but had not seen him since that time. (Ex. 2, Tr. I, 26)

f) M.W., of Dorchester, was contacted regarding eight prescriptions for Percocet, which had been filled at a number of drugstores in Dorchester and Boston, and stated she did not receive or fill these prescriptions, nor did she

have any knowledge of them. She was a current patient of the Respondent's and was upset that her name appeared on the prescriptions. (Ex. 2, Tr. I, 27)

g) P.M., Of Milton, was contacted regarding three prescriptions for Percocet, which had been filled at Heartland Drugs in Quincy, and stated she did not receive or fill these prescriptions, nor did she have any knowledge of them. She was a current patient of the Respondent's and stated that the only time she ever received Percocet was once from a dentist, after the extraction of a wisdom tooth. (Ex. 2, Tr. I, 28)

h) W.F., of West Roxbury, was contacted regarding one prescription for Percocet, and stated she did not receive or fill this prescription, nor did she

have any knowledge of it. She was a current patient of the Respondent's. (Ex. 2, Tr. I, 29)

i) C.M., of Randolph, was contacted regarding two prescriptions for Percocet, which had been filled at a Drug Fair in Randolph, and stated she did not receive or fill these prescriptions, nor did she have any knowledge of them. She was a current patient of the Respondent's and stated that she had not authorized the Respondent to use her name on the prescriptions. (Ex. 2, Tr. I, 30)

j) J.G., of Mattapan, was contacted regarding five prescriptions for Percocet and stated she did not receive or fill these prescriptions, nor did she have any knowledge of them. She last visited the Respondent a year and a half

before to have her blood pressure checked. (Ex. 2, Tr. I, 31)

k) R.M., of Quincy, was contacted regarding one prescription for Percocet, which had been filled at a drugstore in Dorchester, and stated she did not receive or fill this prescription, nor did she have any knowledge of it. She is a current patient of the Respondent's and has been treated by him for weight loss and hypertension. (Ex.2)

l) B.L., Of Brockton, was contacted regarding a prescription for Percocet, and stated she did not receive or fill this prescription, nor did she have any knowledge of it. She had been a patient of the Respondent's since childhood but had not seen him in three years. (Ex. 2)

m) H.Q., Of Dorchester, was contacted regarding four prescriptions

for Percocet, which had been filled at a drugstore in Dorchester, and stated she did not receive or fill these prescriptions, nor did she have any knowledge of them. She was not a patient of the Respondent's, although her daughter is, and stated that she has been in his waiting room with her daughter and grandchildren on occasion. (Ex. 2)

n) H.R., of Milton, was contacted regarding two prescriptions for Percocet which had been filled at a drugstore in Quincy, and stated he did not receive or fill these prescriptions, nor did he have any knowledge of them. He has never been a patient of the Respondent's, nor has he ever heard of him. (Ex. 2)

o) G.S., of Dorchester, was contacted regarding one prescription for Percocet, which had been filled at a drugstore in Dorchester, and stated she did not receive or fill this prescription, nor did she have any knowledge of it. She has been a patient of the Respondent'S for twenty-five years, but has never taken the drug Percocet. (Ex. 2)

p) M.D., of Milton, was contacted regarding three prescriptions for Percocet, which had been filled at a drugstore in Quincy, and stated he did not receive or fill these prescriptions, nor did he have any knowledge of them. He is a former patient of the Respondent's but has not seen him for five years. (Ex. 2)

q) J.T., of Milton, was contacted regarding four prescriptions for Percocet, which had been filled at a drugstore in Quincy, and stated he did not receive or fill these prescriptions. He has been a patient of the Respondent's for twenty years, and last visited him in March, 1987 and received vitamins from the Respondent. (Ex. 2)

r) J.M., of Brockton, was contacted regarding six prescriptions for Percocet, which had been filled at a drugstore in Holbrook, and stated he did not receive or fill these prescriptions, nor did he have any knowledge of them. He last saw the Respondent in June, 1985 for a pulled muscle in his back. He could not recall what medication he had received at the time. (Ex. 2)

s) E.C., of Brockton, was contacted regarding eight prescriptions for Percocet, which had been filled at a drugstore in Holbrook, and stated she did not receive these prescriptions. She has otherwise been a patient of the Respondent's for twenty-eight years. (Ex. 2)

t) W.M., of Braintree, was contacted regarding six prescriptions for Percocet, which had been filled at a drugstore in Braintree, and stated he did not receive these prescriptions. He is otherwise a current patient of the Respondent's. (Ex. 2)

5. On June 5, 1984, members of the State Police Narcotics Unit interviewed Robert Neil Byrnes who related that he and Richard McCartney "cash[ed] the prescriptions" after McCartney had

interested Byrnes in the scam. The police report relates how McCartney and Byrnes carried out their scheme as follows:

> Subject Byrnes stated that he first met Richard McCartney in the Spring of 1984 at the Mattapan State Hospital. . . where he was being treated. Byrnes said that he was broke and McCartney was a patient there also. Byrnes became friendly with McCartney and Byrnes stated that he had no prospects of getting a job and McCartney inquired if he would be interested in cashing prescriptions. McCartney explained that the doctor was friendly with all of the patients and that they would not say anything and that the doctor (Kvitka) would verify the prescriptions if the pharmacy called on them.... Bryne took care of getting all the scripts and would drive him around to all the pharmacies and he would fill them....Concerning the area in which the pharmacies were located, Byrnes stated that they went as far north as Everett, Chelsea and Revere, as far west as Natick, and as far south as Taunton and Attleboro, and down on the Cape as far as Dennisport and Harwich....Byrnes stated that this scam continued until January of 1987 when some patients called the doctor and told him that they had been

> contacted by the State Police.... Byrnes... [said] that McCartney would provide him the money when he went into the pharmacy and that he would get five dollars ($5.00) for each prescription filled. This went on for approximately three years except when the doctor went on vacation - usually to Mexico in September....Byrnes stated that on a couple of occasions he accompanied McCartney to the doctor's office after 5PM when it was closed. The three of them would discuss patient names they were going to use and particular pharmacies. (Ex. 2)

6. On April 30, 1987, the Respondent was arrested at his office. The Respondent admitted to the arresting officers that he had been writing prescriptions for Percocet in the names of his patients and giving them to two individuals, Richard McCartney and Robert Byrnes, who filled them in area pharmacies. (Ex. 2, Tr. I, 36-39) At an interview with the Respondent, which occurred on April 30, 1987, Trooper O'Brien learned from the Respondent,

after he was advised of his Miranda rights, that he had received thirty dollars for each prescription he gave Byrnes and McCartney. He also related that he had been writing prescriptions in this manner for approximately five years. He confessed to having written the 245 prescriptions in question. He stated that he had made approximately eight to ten thousand dollars in this manner. The police asked the Respondent whether he had been coerced or threatened into his actions. The Respondent answered that he had not. When searching for a reason why he had become involved in these activities, "he couldn't come up with one. The best he could say was that he just did it for some extra cash and his quote was 'some pin money' - .. that's the expression

he used.... Some money that he didn't have to report." (Ex. 2, Tr. I, 43-44, 46)

7. As a result of the foregoing events, the Respondent voluntarily surrendered his D.E.A. Certificate of Registration on April 30, 1987, thereby relinquishing his privilege to prescribe controlled substances listed in schedules II through V. (Ex. 3, Tr. I, 40)

8. On April 30, 1987, the Respondent was arraigned in West Roxbury District Court on five counts of violating M.G.L. ch. 94C, sec. 19(a). (Ex. 2)

9. According to a number of supportive testimonials from fellow physicians, former and current patients, he is a dedicated, caring and competent

professional. (Ex. 4) Although the testimonials of persons totally unconnected to the transactions in this proceeding are not relevant to the above Findings, they have been considered by the Board on the issue of sanction.

Conclusions of Law

A. The Respondent is not guilty of fraudulently procuring his certificate of registration or its renewal, in violation of M.G.L. c. 112, § 5(a) and 243 CMR 1.03(5)(a)(1); the prosecutor presented no evidence to prove fraudulent procurement, and, in any event the Respondent's 1987-1989 license renewal properly cites his criminal record and the surrender of his D.E.A. certificate. (Ex. 1)

B. The Respondent is guilty of conduct which places into question his

competence to practice medicine, including gross misconduct in the practice of medicine, practicing medicine fraudulently and beyond its authorized scope, in violation of M.G.L. c. 112, §§ 5(c) and 61 and 243 CMR 1.03(5)(a)(3);

C. The Respondent is guilty of practicing medicine deceitfully and engaging in conduct which has the capacity to deceive or defraud, in violation of 243 CMR 1.03(5)(a)(10);

D. The Respondent is guilty of an offense against provision of the laws of the Commonwealth relating to the practice of medicine, and a rule or regulation adopted thereunder, pursuant to M.G.L. c. 112, § 5(b) and 243 CMR 1.03(5)(a)(2), through his violations of M.G.L. c. 112, §§ 5(c) and 61 and 243

CMR 1.03(5)(a)(3) and 1.03(5)(a)(10), cited in Conclusions B and C above; and,

E. The Respondent is guilty of conduct which undermines public confidence in the integrity of the medical profession and for conduct which shows lack of good moral character. Raymond v. Board of Registration in Medicine, 387 Mass. 708 (1982), Levy v. Board of Registration in Medicine, 378 Mass. 519 (1979).

Sanction and Order

As a licensed physician in the Commonwealth, the Respondent is entrusted with the grave responsibility of issuing prescriptions for controlled substances. In the Matter of John V. Temte, M.D., Board of Registration in Medicine, Adjudicatory Case No. 863, p. 5 (March 18, 1985) (Final Decision and

Order). This Board has long viewed with the utmost seriousness any physician's inability or failure to faithfully discharge this responsibility. In the Matter of Earl Hoffman, M.D., Board of Registration in Medicine (November 20, 1985) (Final Order).

The Respondent's conduct in this case constituted a flagrant abuse of the public trust relating to controlled substances, and such actions require the Board to take appropriate action to protect the public. Levy v. Board of Registration in Medicine, 378 Mass. 519 (1979). The Board has indicated in previous decisions that misconduct in the area of prescription practice will not be treated lightly. See, e.g., In the Matter of Arthur Baer, M.D., Adjudicatory Case No. 205; In the Matter

of Philip I. Hershberg, M.D., Adjudicatory Case No. 905, affirmed sub nom. Hershberg v. Board of Registration in Medicine, S.J.C. 82-341 (8/11/83); In the Matter of Norman Hassler, M.D., Adjudicatory Case No. 83-8; In the Matter of Alexander T. Arthurs, M.D., Adjudicatory Case No. 76-76, affirmed, sub. nom. Arthurs v. Board of Registration in Medicine, 383 Mass. 299 (1981); In the Matter of Sylvester August, M.D., Adjudicatory Case No. 683; In the Matter of Thomas L. Rafferty, M.D., Adjudicatory Case 83-9; In the Matter of Archie Keigan, M.D. Adjudicatory Case No. 817; and In the Matter of Daniel R. Zoll, M.D., Adjudicatory Case No. 84-1.

The Board hereby revokes the Respondent's license to practice

medicine in the Commonwealth. The Respondent is further ordered to pay a fine in the amount of ten thousand dollars ($10,000.00), the estimated sum that the Respondent gained by his fraudulent scheme, to be remitted within fourteen days of this Final Decision and Order.

This sanction is prompted by any one of the Conclusions of Law lettered "B" through "E" above, and not a combination of any or all of them.

The Respondent has the right to appeal this Final Decision and Order within 30 days, pursuant to M.G.L. ch. 30A, secs. 14 & 15, and M.G.L. ch. 112, sec. 64. The Respondent is directed to surrender his original certificate and any unexpired wallet card within

fourteen (14) days' receipt of this Final Decision and Order.

/S/
Andrew G. Bodnar, M.D., J.D.
Chairman

Dated: September 7, 1988

(2)

Supreme Court, U.S.
FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-2003

In The
Supreme Court of the United States

OCTOBER TERM, 1989

MASSACHUSETTS BOARD OF REGISTRATION
IN MEDICINE,
PETITIONER,

v.

LAWRENCE KVITKA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

**Brief for the respondents
in opposition to petition
for certiorari**

HARVEY A. SCHWARTZ*
DALE C. SCHNEIDER
SCHWARTZ, SHAW & GRIFFITH
205 Portland Street
Boston, Massachusetts 02114
(617) 227-2414

* Counsel of Record

Contents

Table of Authorities ii

Constitutional and statutory provisions 2

Statement of the case 3

Reasons why the Petition should be denied . 3

I. The Massachusetts Supreme Judicial Court Correctly Applied United States v. Halper 3

II. The Massachusetts Supreme Judicial Court Correctly Held that the Board's Stated Intention to Disgorge Illicit Profits from Kvitka Was Not a Legitimate Remedial Purpose, but, Rather, was Punitive 7

III. The Massachusetts Supreme Judicial Court's Decision was based on a Narrow Application of Facts and Poses Little Threat to Law Enforcement Proceedings 8

Conclusion 10

Table of Authorities

Cases

Feldstein v. Board of Registration
in Medicine, 387 Mass. 339
439 N.E.2d 824 (1982) 6

Levy v. Board of Registration
and Discipline in Medicine,
378 Mass. 519, 392 N.E.2d 1036 (1979) 6

Porter v. Warner Holding Co., 328 U.S.
395, 66 S.Ct. 1086, 90 L.Ed 1332 (1946) 8

Tull v. United States,
__ U.S. __, 107 S.Ct. 1831 (1987) 7

United States v. Halper, __ U.S. __,
109 S.Ct. 1892 (1989) 3, 4, 5, 7

Statutes

United States Constitution
Fifth Amendment,
Double Jeopardy Clause 2, 3

Mass. G.L. c. 112, sec. 5 2

Mass. G.L. c. 112, sec. 64 2

No. 89-2003

In the
Supreme Court of the United States

October Term, 1989

MASSACHUSETTS BOARD OF REGISTRATION
IN MEDICINE,
PETITIONER,

v.

LAWRENCE KVITKA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent respectfully requests that this Court decline to issue a Petition for a Writ of Certiorari to review the judgment in this case of the Supreme Judicial Court of Massachusetts issued March 27, 1990.

Constitutional and statutory provisions

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Mass. G.L. c. 112, § 5 (1988 ed.) provides in relevant part:

> The board [of registration in medicine] may, after a hearing . . . revoke, suspend, or cancel the certificate of registration, or reprimand, censure, impose a fine not to exceed ten thousand dollars for each classification of violation, require the performance of up to one hundred hours of public service, in a manner and at a time and place to be determined by the board, require a course of education or training or otherwise discipline a physician . . .

Mass. G.L. c. 112, § 64 (1988 ed.) provides in relevant part:

> The supreme judicial court, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, may enter a decree revising or reversing the decision of the board in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A . . .

Statement of the case

Respondent refers to the statement of facts set forth in the opinion of the Massachusetts Supreme Judicial Court located in the Petition at pages 1a - 7a.

Reasons why the Petition should be denied

I. The Massachusetts Supreme Judicial Court Correctly Applied United States v. Halper.

The Massachusetts Supreme Judicial Court ("the SJC") correctly applied the United States Supreme Court's decision in *United States v. Halper*, __ U.S. __, 109 S.Ct. 1892 (1989) to the present case. In *Halper* the defendant physician had been convicted of making false claims in connection with the federal Medicare program. He received a two year jail sentence and a $5,000 fine. Following the criminal conviction, the government imposed civil fines in the amount of $130,000. This Court unanimously ruled that the constitutional guarantee against double jeopardy was violated by the imposition of a civil fine following a

criminal conviction. It recognized "that civil proceedings may advance punitive as well as remedial goals" and explained:

> ...a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment... a civil sanction that cannot fairly be said **solely** to serve a remedial purpose, but rather can be explained only as **also** serving either retributive or deterrent purposes, is punishment. 109 S. Ct. at 1901-02. (emphasis added).

The SJC determined that the fine imposed on Dr. Kvitka was barred by *Halper* because the Board of Registration in Medicine ("the Board") in its Final Decision and Order explicitly stated that its purpose in imposing the fine was to punish Dr. Kvitka and deter future wrongdoers. In its Final Decision and Order the Board characterized Dr. Kvitka's actions as "a flagrant abuse of the public trust" (Petition at p. 34a) and stated that "misconduct in the area of prescription practice will not be treated lightly" (Petition at p. 34a). The SJC found that these statements "indicate both a desire on the part of the board to penalize the physician and a

warning to other physicians to refrain from engaging in similar conduct." 407 Mass. at 145, 551 N.E.2d at 918. As a result, the SJC determined the imposition of the fine was punitive.

Petitioner, citing footnote seven of *Halper*, __ U.S. at __, 109 S.Ct. at 1901[1], claims the SJC erred by considering the Board's stated intention rather than the purposes actually served by the sanction. *Halper* provides that it is the character of the actual sanction imposed that is to be evaluated. __ U.S. at __, 109 S.Ct. at 1901. A fair reading of footnote 7 in its entirely reveals that it was directed to a governmental authority's attempt to cloak punishment under the guise

---

[1] Footnote 7 reads:

> This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment. [citations omitted] Rather, we hold that merely in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying proceeding giving rise to the sanction, that must be evaluated.

of a civil sanction. It does not apply to those situations in which the sanctioning authority squarely admits its intention is to punish and deter.

The purpose actually served by imposing a fine on Dr. Kvitka was to punish him. The purpose of proceedings by the Board of Registration in Medicine is not to take retribution against a physician, but rather to protect the public from a physician who lacks competency or integrity. *Feldstein v. Board of Registration in Medicine*, 387 Mass. 339, 341, 439 N.E.2d 824, 826 (1982); *Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 527-28, 392 N.E.2d 1036, 1041 (1979). However, once the Board revoked Dr. Kvitka's license to practice medicine he no longer posed any threat to society and there was no further sanction the Board could impose to protect the public. Where the Board revoked his license and at the same time imposed a fine, the fine can only be characterized as a retributory act rather than one designed to protect the public. As a result, the

'purposes actually served' by the fine are punitive.

II. The Massachusetts Supreme Judicial Court Correctly Held that the Board's Stated Intention to Disgorge Illicit Profits from Kvitka Was Not a Legitimate Remedial Purpose, but, Rather, was Punitive.

Respondent incorrectly assigns error to the SJC's finding that "[e]ven if, as the board suggests, the fine amounted to a forced disgorgment of illicit profits, that purpose cannot be considered remedial under the double jeopardy clause." 407 Mass. at 146, 551 N.E.2d at 918. The SJC reasoned that "[t]his is not a case where the government has suffered a loss because of the physician's fraud, [citing *Halper*] or where there is an identifiable victim who has suffered damages due to the physician's actions." Id.

Disgorgment provides restitution to persons harmed by illegality. In *Tull v. United State*s, __ U.S. __, 107 S.Ct. 1831 (1987) this Court explained:

> An action for disgorgment of improper profits... is a remedy only for restitution--a more limited form of penalty than a civil fine. Restitution is limited

> to "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant."

__ U.S. at __, 107 S.Ct. at 1839, quoting from *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed 1332 (1946). Thus, the SJC correctly reasoned that because there was no identifiable victim in Dr. Kvitka's crime to return disgorged funds to, any fine based upon disgorgment of illicit profits could not be considered remedial. The Board itself suffered no losses from Dr. Kvitka's wrongdoing and as a result may not profit from it.

III. The Massachusetts Supreme Judicial Court's Decision was based on a Narrow Application of Facts and Poses Little Threat to Law Enforcement Proceedings.

The Petition for Writ of Certiorari should be denied because it is based on a narrow application of law in unusual circumstances. The Board explicitly asserted its purpose in assessing the fine was to punish and deter other physicians. As the Board stated its

punitive intent, the SJC correctly held that jeopardy should attach.

The SJC's holding is narrow. It does not bar the Board from levying all fines, but merely those that are punitive in nature. For these reasons, review by the Supreme Court is not warranted.

Finally, review is not warranted because the specific fine in this case was clearly punitive, not remedial. The cases relied on by the Petitioner for the proposition that all civil sanctions are remedial involve rough reimbursement **to the government** for **its** financial losses, from Medicare or Medicaid, from the Internal Revenue Service, and for investigatory expenses. The present case does not involve financial loss suffered by the government. This distinction between "reimbursement" to the party suffering a loss, which is properly remedial, and straightforward " disgorgment" of ill-gotten gains, which only goes to punish the wrongdoer, is the heart of the legal doctrine at issue. Reimbursement goes to right a wrong. Pure

disgorgment goes only to prove that crime does not pay. The former is a "remedy;" the latter is a "punishment."

CONCLUSION

For all the above reasons the Petition for a Writ of Certiorari should be denied.

Harvey A. Schwartz
HARVEY A. SCHWARTZ*
DALE C. SCHNEIDER
SCHWARTZ, SHAW & GRIFFITH
205 Portland Street
Boston, Massachusetts 02114
(617) 227-2414

* Counsel of Record